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No. 03-1519

Supreme Court, U.S.
FILED
JUL 20 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MARLON BRAMWELL,

Petitioner,

v.

UNITED STATES BUREAU OF PRISONS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

I. The 2000 Amendment To Section 2680(c) Did Not Change Or Affect The Language At Issue In This Case, Which Gives Rise To The Conflict In The Circuits 1

II. *Kosak v. United States* Cannot Be Read To Transform Every Law-Enforcement Contact With Property Into A "Detention" 6

Conclusion 8

TABLE OF AUTHORITIES

Page

CASES:

Bazuaye v. United States, 83 F.3d 482 (D.C. Cir. 1996) 6

Brecht v. Abrahamson, 507 U.S. 619 (1993) 7

Chapa v. United States DOJ, 339 F.3d 388 (5th Cir. 2003) 2, 5, 6

Crawford v. United States DOJ, 123 F.Supp.2d 1012 (S.D. Miss. 2000) 5

Hatten v. White, 275 F.3d 1208 (10th Cir. 2001) 2, 5, 6

Kosak v. United States, 465 U.S. 848 (1984) 6, 7

Kurinsky v. United States, 33 F.3d 594 (6th Cir. 1994) 6

O'Ferrell v. United States, 253 F.3d 1257 (11th Cir. 2001) 2, 5, 6

Ortloff v. United States, 335 F.3d 652 (7th Cir. 2003) 6

Schlaebitz v. United States DOJ, 924 F.2d 193 (11th Cir. 1991) 5

Webster v. Fall, 266 U.S. 507 (1925) 7

STATUTES:

8 U.S.C. § 1324 (2000) 2

28 U.S.C. § 2680(c) (1994) 3

28 U.S.C. § 2680(c) (2000) 1, 2, 3, 5, 6

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS:

28 C.F.R. §§ 541.20-541.22 (2003) 7

28 C.F.R. § 541.21(c)(7) (2003) 7

28 C.F.R. § 541.22(d) (2003) 7

OTHER AUTHORITIES:

H.R. Rep. No. 106-192 (1999) 3, 4

Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000) 1, 2, 5

146 Cong. Rec. S1759-62 (daily ed. Mar. 27, 2000) 3

146 Cong. Rec. H2051 (daily ed. Apr. 11, 2000) 2

PETITIONER'S REPLY BRIEF

Mr. Bramwell discussed in his petition the deep split among the courts of appeals, enhanced by the Ninth Circuit's erroneous analysis, on the scope of the "other law enforcement officer" provision in 28 U.S.C. § 2680(c). The Government asserts that there really is no split, contending that the enactment of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA") created a jurisprudential *tabula rasa* on Section 2680(c)'s proper construction. The Government also asserts that the Court need not enunciate the reach of "detention" in Section 2680(c) because it is clear that the prison officer "intended to detain" all of Mr. Bramwell's property. Neither argument is correct.

I. The 2000 Amendment To Section 2680(c) Did Not Change Or Affect The Language At Issue In This Case, Which Gives Rise To The Conflict In The Circuits.

The Government claims that the amendment of Section 2680(c) by CAFRA, Pub. L. No. 106-185, § 3(a), 114 Stat. 202, 211 (2000), eliminated the deep division among the courts of appeals on the reach of "other law enforcement officer" immunity. Brief in Opposition ("Br. in Opp.") at 5-9. Its theory is grounded on the uniformity of the appellate decisions involving post-CAFRA Section 2680(c), and the absence of decisions addressing the post-CAFRA language from the Sixth, Seventh, and D.C. Circuits, which construed Section 2680(c)'s original language to limit immunity to law-enforcement officers involved in customs or excise activities. *See* Br. in Opp. at 6-7.

The Government overlooks, however, that CAFRA is inapplicable in cases, like Mr. Bramwell's, that do not

involve forfeiture proceedings. CAFRA's effective-date provision states, in pertinent part, that

> this Act and ***the amendments made by this Act*** shall apply to any ***forfeiture proceeding*** commenced on or after the date that is 120 days after the date of the enactment of this Act.

CAFRA § 21, 114 Stat. at 225 (codified at 8 U.S.C. § 1324 note) (emphasis added). *See also* 146 Cong. Rec. at H2051 (daily ed. Apr. 11, 2000) (statement of Rep. Hyde) (reproducing Congressional Budget Office discussion of CAFRA's effective-date provision). Consequently, not only is CAFRA inapplicable to Mr. Bramwell's case, it was inapplicable in each post-amendment case in which the Government asserts it was interpreted. *See Chapa v. United States DOJ*, 339 F.3d 388 (5th Cir. 2003); *Hatten v. White*, 275 F.3d 1208 (10th Cir. 2002); *O'Ferrell v. United States*, 253 F.3d 1257 (11th Cir. 2001); Br. in Opp. at 6.

Even if CAFRA were applicable in non-forfeiture-related cases, it does not, as the Government contends, supercede the jurisprudence addressing the pre-CAFRA statute. Section 2680(c) presently provides (with the pertinent CAFRA additions emphasized):

> Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, ***or other property*** by any officer of customs or excise or any other law enforcement officer, ***except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if –***

> ***(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;***
>
> ***(2) the interest of the claimant was not forfeited;***
>
> ***(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and***
>
> ***(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law*[.]**

28 U.S.C. § 2680(c) (emphasis added). *See also* 28 U.S.C. § 2680(c) (1994). The new language does not affect in any way the language at issue in this case. It merely ensures that Section 2680(c) cannot foreclose claims related to property that had been detained for forfeiture, if the enumerated conditions are met. It says nothing about the types of activities in which law-enforcement officers must be engaged for Section 2680(c) to immunize the United States from suit.

CAFRA's legislative history confirms the amendment's limited purpose, and that it was ancillary to Congress's desire to completely overhaul forfeiture laws and procedures. The House Judiciary Committee's report identifies CAFRA's "Purpose and Summary" as "creat[ing] general rules relating to federal civil forfeiture proceedings designed to increase the due process safeguards for property owners whose property has been seized." H.R. Rep. No. 106-192, at 2 (1999). *See also* 146 Cong. Rec. S1759-62

(daily ed. Mar. 27, 2000). The Committee's only discussion of Section 2680(c) was to state:

> The bill amends the Federal Tort Claims Act to allow for tort claims against the United States government based on the destruction, injury, or loss of goods, merchandise, or other property while in the possession of any law enforcement officer ***if the property had been seized for the purpose of forfeiture***.

H.R. Rep. No. 106-192, at 18 (emphasis added). There would presumably have been at least some discussion of the divergence of the courts of appeals on the meaning of "other law enforcement officer" had Congress contemplated that CAFRA would affect that provision in any way.

Despite the amendment's plain text and purpose, the Government maintains that the current language "differ[s] in respects that are relevant to the issue here." Br. in Opp. at 6. It first assigns significance to the insertion of "or other property" following "goods or merchandise[,]" asserting that it would make it "difficult for a court to construe the term 'other law enforcement officer' narrowly on the theory that the only officers who detain 'goods or merchandise' are those who are acting in a tax, excise, or customs capacity." Br. in Opp. at 7. This discussion, however, is more aptly described as an attempt to rebut the interpretation of Section 2680(c) that Mr. Bramwell proposes. Unless the Government is implicitly conceding that it was ***not*** difficult to interpret "other law enforcement officer" narrowly pre-CAFRA, this analysis cannot be describing a substantive difference between the statute's current language and that interpreted by the courts of appeals pre-CAFRA.

The Government next cites the predominant change to the statute – the forfeiture exception – but again fails to identify a change to the pertinent language. The Government reasons that because federal law-enforcement officers seize property for forfeiture in circumstances outside of customs and excise, "CAFRA reinforces the view that a broad group of law-enforcement agents are presumptively excepted from the FTCA's coverage[.]" Br. in Opp. at 7. Once again, the Government is simply citing CAFRA as support for its interpretation of the scope of "other law enforcement officer" in the original, unchanged language at issue.

Moreover, it is evident that the courts of appeals do not discern a substantive difference in Section 2680(c)'s pertinent language. Post-CAFRA Section 2680(c) governed Mr. Bramwell's case from its onset, but the Ninth Circuit supported its holding by citing to appellate decisions involving ***both*** versions of the statute. *See* Pet. App. at 4-5 (Ninth Circuit opinion), 9 (district court noting that action was filed in July 2001); CAFRA § 21, 114 Stat. at 225 (delineating CAFRA's applicability). Indeed, in the very cases cited by the Government as proof of post-CAFRA circuit uniformity, each court relied exclusively on precedent interpreting the ***pre-CAFRA*** statute, and ***omitted the forfeiture-exception provisions when reciting Section 2680(c)***, no doubt because they, quite properly, believed them irrelevant. *See Chapa*, 339 F.3d at 390 (citing only pre-CAFRA cases); *Hatten*, 275 F.3d at 1210 (citing *Crawford v. United States DOJ*, 123 F.Supp.2d 1012, 1013 (S.D. Miss. 2000)); *O'Ferrell*, 253 F.3d at 1271 (citing *Schlaebitz v. United States DOJ*, 924 F.2d 193, 194 (11th Cir. 1991)).

The Government concludes by citing cases involving Section 2680(c) in which the Court has recently denied writs of *certiorari*, and hypothesizing that the Court did so because it wishes to provide the minority-rule courts – the Sixth, Seventh, and D.C. Circuits – an opportunity to address the amended language. Br. in. Opp. at 8-9. It is much more likely, however, that the Court denied those petitions because the petitioners – all incarcerated and proceeding *pro se* – lacked the training and resources to effectively identify the flaws in the Government's position. In any event, if the Sixth, Seventh, and D.C. Circuits were to follow the lead of the *Chapa*, *Hatten*, and *O'Ferrell* courts and rely on cases addressing the pre-CAFRA statute when they next encounter Section 2680(c), they will continue to limit the non-forfeiture-related provision to officers engaged in customs or excise activities. *See Ortloff v. United States*, 335 F.3d 652, 660 (7th Cir. 2003); *Bazuaye v. United States*, 83 F.3d 482, 486 (D.C. Cir. 1996); *Kurinsky v. United States*, 33 F.3d 594, 598 (6th Cir. 1994). Consequently, the Court will ultimately have to resolve the circuit split, and should choose to do so now.

II. *Kosak v. United States* Cannot Be Read To Transform Every Law-Enforcement Contact With Property Into A "Detention."

The Government asserts that the Court's holding in *Kosak v. United States*, 465 U.S. 848 (1984), that Section 2680(c) governs claims arising from "negligent handling or storage" of property reaches to unknowing possession of property. Br. in Opp. at 9. The effect of such a conclusion would be to create a "detention" every time an officer touches property. In *Kosak*, however, there was no question that the property had been detained; Kosak even

conceded this. *See Kosak*, 465 U.S. at 849-50, 853 n.8. Consequently, *Kosak*'s "negligent handling or storage" holding does not control unless there has been a "detention" of property. *See Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) ("since we have never squarely addressed the issue, . . . we are free to address the issue on the merits."); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

The Government concludes by arguing that "[w]hile the officers may not have known what was in the pockets of petitioner's coat, they certainly intended to detain both the coat and anything left in the pockets. . . . " Br. in Opp. at 9. This contention begs the question. Although the record does not reveal if Mr. Bramwell was placed in "disciplinary segregation" or "administrative detention,"[1] the controlling regulations did not foreclose return of his non-contraband property upon his request. *See* 28 C.F.R. §§ 541.21(c)(7), 541.22(d) (2003) (not prohibiting return of impounded property). Thus, Mr. Bramwell's coat was "detained" only if "detention" includes situations where the property must be returned to its owner on demand. Even then, his eyeglasses would not be "detained" unless "detention" covers items the officer did not even know he or she possessed. Perhaps "detention" does encompass such situations, but neither courts nor claimants can be sure until the Court construes the term.

[1] *See* 28 C.F.R. §§ 541.20-541.22 (2003) (defining and governing disciplinary segregation and administrative detention).

CONCLUSION

For the reasons stated herein and in Mr. Bramwell's petition, the Court should issue a writ of *certiorari*.

Respectfully submitted,

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